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ABSTRACT

Increasing demands for professional accountability in education, coupled with a growing tendency in the American public to seek redress through the courts, have given rise to the educational malpractice suit, alleging that students have failed to learn because schools have been negligent in their duty to educate. This chapter provides guidelines by which educators may prevent malpractice suits or minimize their damage through identifying good professional practices, improving present practices, and eliminating practices which have the potential for liability as educational malpractice. Good professional practices include minimum standards for competency and for grade promotion, specific goals and remediation procedures for each grade, systematic student evaluation, adherence to rules, procedural safeguards, and equitable financing patterns. Suggestions are also offered for legal and legislative reforms to ease the burden of educational malpractice suits, including redefinition of tenure, government immunity for state employees, flat rate malpractice insurance, and arbitration. (TE)

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How to Avoid an Educational Malpractice Suit

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WHY DO I NEED THIS INFORMATION?

Nearly every state requires its children to attend schools for eight to ten years. Many states provide either through the state constitution or through legislative enactment that the education provided be "adequate" or "effective," and recently all fifty states have considered some form of legislation to hold schools accountable for providing such an education. The Supreme Court has said that

> [u]niversal compulsory education is such an integral part of American Society that its underlying assumptions are rarely questioned. . . . [I]t is perhaps the most important function of state and local governments.[1]

While the courts have not said that there is any implicit right to an effective education,[2] it has "strongly implied that individuals have a fundamental right to basic minimal skills necessary for the enjoyment of the right of free speech and full participation in the political process."[3] A recent federal district court decision has, for the first time, held that graduation from high school is both a property and a liberty right.[4]

1. *See* Brown v. Board of Educ, 347 U.S. 483, 493 (1954); *Project-Education and the Law: State Interests and Individual Rights*, MICH. L. REV (June 1976).
2. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1972); *Project-Education and the Law: State Interests and Individual Rights*, MICH. L. REV. (June 1976).
3. *Id.*
4. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

There is little doubt that effectively educating our youth is an integral part of American Society—involving enormous resources and costing billions of dollars each year.

In 1983-84 Florida alone will spend close to $2.75 billion to provide an educational opportunity to its 1,600,000 public school students through its program of 32 services which includes alternative and basic programs. The 67 school districts will employ 151,530 teachers, administrators, supervisors, and other staff to help carry out this huge task.

Education can surely be considered a high priority item when it demands eight percent of the gross national product, requires tremendous legislative effort, and generates thousands of legal suits each year. Yet, with all the effort our nation expends to produce healthy, happy, functionally literate individuals sometimes something goes wrong: a law is passed that is unfair to a particular group of students; a school district fails to enforce its own rule; an incompetent teacher is employed; or, an otherwise competent teacher violates his professional obligations.

WHAT ELSE CAN GO WRONG?

A student could be hurt physically while playing on the school playground. If he was improperly supervised at the time of the accident, his teacher could be held accountable for her failure to protect him from harm. If the teacher happened to be a coach who acted overzealously, insisting that a student perform beyond his physical ability, a court of law would say that the teacher must be held financially liable for the harm suffered by his student.[5] Negligence which results in physical harm to children under the protection of adults who should have foreseen the imminent danger has resulted in a substantial number of court cases. Often teachers are held financially responsible for the harm students suffer as a result of teacher negligence.[6] Academic negligence, on the other hand, is a somewhat new phenomenon for educators. Such instances, where a student's harm is academic rather than physical, have resulted in suits charging school districts with what has become known as "educational malpractice."

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5. *See, e.g.*, District School Bd. of Lake Cty. v. Talmadge, 381 So. 2d 698 (Fla. 1980). A physical education teacher was held liable for his personal negligence that resulted in a student injury.

6. In Raleigh v. Independent School Dist., 275 N.W.2d 572 (Minn. 1978), plaintiff recovered damages suffered when she was cut by another student while attending a movie with her high school class. The teacher was found negligent in failing to provide for the student's safety.

WHAT IS EDUCATIONAL MALPRACTICE?

Educational malpractice has not been defined by a court. For purposes here it is defined as

> an intentional or negligent act or failure to act which constitutes a breach of duty to properly educate or place a student which results in an injury to that student.

Article IX, Section I of the Florida Constitution provides

> [a]dequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of higher learning and other public education programs that the needs of the people may require.

Most states have a similar requirement that students be provided an adequate, effective, minimum educational program. If a school district were to arbitrarily deny an adequate free public education to a student and the student suffered harm as he most surely would if he were without an education, the school district may be said to be guilty of educational malpractice.

WHAT CONSTITUTES NEGLIGENCE?

Negligence represents one category of tort[7] law which is best described as an action that fails below an acknowledged standard of care which results in injury to another person. The basic elements necessary to establish negligence are: 1) a duty to conform to a standard of conduct established to protect; 2) a failure to conform to that standard; 3) a harm suffered which is legally compensable; and 4) a causal relationship between the harm suffered and the failure to conform.[8]

A professional is generally held to a higher standard than that of an ordinary man. That standard is often established both by professional standards and by public policy.[9] Under the law of torts, once a professional undertakes to perform a duty, the law of negligence requires him to do it with care. Malpractice adds one more dimension to the element of "care;" the aspect of a special relationship existent between the professional (doctor, lawyer, educator) and the client (patient, student). Courts have acknowledged that a special relationship exists between student and teacher and that teachers are required to behave as professionals.

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7. Tort is defined as a "civil wrong."
8. THE YERBOOK OF SCHOOL LAW 1978 (P. Piele ed. NOLPE) at 238.
9. J. Blackburn, *Educational Malpractice*, 7 FORDHAM URBAN L. J. (1978-79).

WHAT DOES THIS MEAN TO ME?

To date, no court has recognized educational malpractice as a viable basis upon which to recover damages. Many experts feel that educational malpractice should be judicially recognized and that as statutes and regulatory mandates create greater accountability in public education and specify more clearly a standard of care, the courts may at last recognize such a cause of action. That will mean that students who suffer academic "injuries" because a school system failed to live up to its mandate may turn to the court for remedy.

With increased access to legal services, more Americans sue today than ever before. Publicity about such suits tends to breed even more. The medical profession has been severely distorted by suits and fear of more suits. One of every two doctors can be expected to be sued during his career. Some doctors pay more in insurance premiums than many teachers earn![10]

The suit phenomenon has moved beyond the health care services and has affected attorneys, architects, engineers, and educators. Educational malpractice, almost unheard of before the *Peter W.* case in California in 1972,[11] is now at least a familiar expression if not a source of alarm, for most authorities in law and education. To date, three cases have reached state supreme court or court of appeal level and many other states such as Florida, Maryland, and New Jersey have experienced suits alleging educational malpractice.[12]

Many other cases such as those involving testing issues, diploma denial, and inappropriate placement have implications for educational malpractice type litigation.

Florida, for example, has had one educational malpractice case in one county, has one with implications for a malpractice suit pending in federal district court in another county and has recently completed a five-year-long suit related to its testing program in federal circuit court and is currently defending the test in another suit in federal district court.[13]

HOW CAN WE PREVENT MALPRACTICE?

It is generally wiser to solve problems rather than crises; to deal with those problems at the symptomatic stage rather than wait for the

10. M. Halberstam, *Hey, You Ought to Sue the Teacher*, AM. EDUC. (Nov. 1978) at 7-10.
11. Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).
12. *See* Garrett v. Broward Cty., No. 77-8703 (Fla. Cir. Ct. 1978); Doe v. Board of Educ. of Montgomery Cty., 48 U.S.L.W. 2077 (Md. July 31, 1979).
13. *See* Garrett v. Broward Cty., *supra* note 12; Debra P. v. Turlington, *supra* note 4, and Love v. Turlington, No. 80-550-Civ-FH (M.D. Fla., filed May 6, 1980).

disease to become an epidemic. The task of remedying malpractice should be to alleviate those educational practices that can be alleviated, and encourage those practices that should be encouraged. The job should not be reduced to preventing or fulfilling a predicted future.[14] Whether or not suits will occur is really not the major issue. Identifying educational malpractices relevant to the educational malpractice situation, eliminating or encouraging them in an appropriate manner, and ultimately improving the quality of education is the issue. If this incidentally brings about a reduction in the number of suits, so much the better. The guidelines contained here are a reaction to a serious problem not a genuine crisis, and are an attempt to create a manageable noncrisis atmosphere where reason will generate wise judgments.

A recent report prepared by HEW estimated that five million patients are injured each year. Of that number, perhaps one million have sufficient base in negligence that a viable lawsuit could be forthcoming. Originally, patient ignorance could be counted on to keep the numbers of suits low. A 10-15 percent increase annually from the mid 1960's has shown the illogic of counting on that as a preventer of suits. Comparable figures in education have not been calculated but with the vast numbers of students in our public schools, the number of viable claims can be projected to be at least enough to consider educational malpractice a serious problem.

WHAT SHOULD SUCH GUIDELINES INCLUDE?

Educational guidelines can pattern themselves very easily after those established for other professionals.

(1) Determine what are good practices for the educational profession;

(2) Determine what actions are provoking suits or are, in general, bad educational practices;

(3) Define what restrictions, such as state laws, impede improved practices; and,

(4) Describe future considerations such as alternatives to going to court, insurance, etc. that are necessary to minimize the impact when suits do occur.

WHAT CAN WE EXPECT?

Lawsuits tend to be epidemic; the more the public reads about them, knows about them, the more the right to sue will be directed

14. R. GOTS, THE TRUTH ABOUT MEDICAL MALPRACTICE 198 (1975).

against the educator. If the medical analogy holds up, malpractice suits can be expected to affect education by stifling innovation, increasing paperwork, and creating adversaries from parents.[15]

If malpractice suits have the effect on educators that they have had on other professions, and there is much evidence that this may very well be so, the choices for educators become limited. They can sit by and wait for a more sophisticated plaintiff to appear and win his suit; or educators can accept the message of the courts thus far—renew faith in themselves as being the best authorities on education—and make some changes that will eliminate many of education's bad practices.

Negligence occurs in the academic arena just as surely as it does on the playground, on the highway or under the surgeon's knife. The harm negligence or educational malpractice causes may be less visible to the naked eye than an injured body but many would argue that an injured, uneducated mind is far more devastating to the individual and his self image than that of a broken bone or temporary psychological trauma. Tort law provides a remedy for most forms of harm done by negligence and malpractice, but, for policy reasons, educators have been immune from this liability. Educators themselves have been left with the responsibility, if not the legal mandate, to provide the remedy.

Malpractice in any field bears but a "tangential relationship" to genuine malpractice. Although actual malpractice occurs, suits tend to occur in areas where clients have high expectations, little tolerance, and access to lawyers. Courts may have adopted a hands off attitude toward educational malpractice suits for the present but as Belle Lind Gordon pointed out:

> [F]inal responsibility for determining the validity of state educational standards and school board rules must lie with the courts if only for the reason that no other recourse exists.[16]

Let professional educators assert what they have known all along—that to educate implies a duty to educate with diligence, regard, and care.[17]

WHAT SHOULD WE DO FIRST?

Educators should take the intiative and define good educational practices. Next, they should analyze closely actual practices, with

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15. M. Halberstam, *supra* note 10 at 7-10.

16. B. Gordon, *Doe v. San Francisco Unified School District, 1973: Tort Liability for Failure to Educate*, 6 LOY. U.L.J. 462 (1975).

17. L. Lessinger, *The Exercise of Due Care in Education: Towards Standards of Professional Practice*, EDUC. TECH. (April 1980) at 15-19.

special emphasis on those that tend to be suit-producing activities. It must be determined what, if any, impediments exist within the law or elsewhere that preclude changing these practices.

WHAT ARE GOOD PROFESSIONAL PRACTICES?

Generally, a good professional practice is one which is reasonable to both the practitioner (educator, in this case) and the client (parents and students), and can be easily implemented. The following suggestions are adaptations of general recommendations made by those in other professions for improvements in their respective fields. They offer advice that can be valuable as educators attempt to determine what is good educational practice.

Establish education as a professional practice

Educators may do well to look at the path that has been worn in this direction by other professional groups and take a second look at what eduators have done in this area. Most professional groups have banded together to strengthen their profession by limiting access to the field, establishing standards of conduct and ethical behavior, and removing from practice those who perform their work negligently.

Leon Lessinger, the father of accountability in education, urges development of a professional practices attitude based upon legal and practical principles of due regard, due care, and due process. Due regard refers to an awareness on the part of educators that they are indeed practicing professionals. Due care refers to carrying out the educational process with a humane attitude that requires that educators take care to do what is best for every student. Due process provides that a mechanism be established to allow parents and students a forum for disagreement with educational policies and practices.

The development of professional standards and ethics, establishing internal monitoring devices such as professional practices councils, and influencing legislative decision making can be positive steps toward the evolution of education as a professional practice.

Utilize the information we have available to take a look at educators' problem areas

Factual data can be gathered easily by the professional practice council, from the office of the general counsel for the department of education, school board attorneys' associations, teachers' unions and other sources concerning unacceptable educational practices. Although, with the exception of the professional practices council, these are not investigatory agencies, analyses of complaints against

teachers, administrators, and school boards will reveal behaviors of teachers and other educators which provoke investigation. By their very nature of attracting unfavorable attention, these may be practices that should be targeted as ones to be abolished as quickly as possible.

Be reasonable

It is reasonable to expect that an unusual situation calling for special care and attention receive special care and attention. It is reasonable to admit a mistake if one has occurred and to assure parents that the school is making every effort to provide a remedy. It is unreasonable to delay advising parents of a problem in the hopes that they either will remain unaware or, upon discovery, will not take action. It is reasonable to acknowledge the problem and to suggest alternatives before proceeding. No attempt should be made to conceal, downplay, or minimize the problem. Where it is appropriate, parental consent should be given before electing an alternative course of action. Consent should be informed, voluntary, and unhurried, and no attempt should be made to embellish the remedy.[18]

Reasonable also applies to our expectation of teachers

It must first be determined if the expectations for teachers are realistic. Once the unrealistic elements are identified changes need to be made to accommodate the identified needs that are not being met. For example, is it realistic to ask a first grade teacher to attempt to teach reading to 30 youngsters where the range of reading ability is 0-4.5 and the curriculum is such that only one hour a day can be allotted for reading *per se*? If this is, in fact, a fantasy, and a teacher needs two hours, a more flexible curriculum, fewer students, and a narrower range of ability levels, then these identified needs must be met before she can reasonably be expected to operate realistically. Allowing the first situation to perpetuate itself may well result in a lower achievement rate, a higher failure rate, misdiagnosis of reading and language problems, and discipline problems which contribute to less than adequate education and may create liability. They, in other words, contribute to education's bad practices and may also provoke malpractice suits.

Teachers have argued for years that what they need to do their job better is to have fewer students. What they have received is practically everything but: higher salaries, more sick leave, additional health and life insurance, longer vacations, shorter vacations, more inservice, less inservice, paid college tuition, more stringent entry requirements, teacher competency tests, student competency tests—but very little

18. W. ALTON, JR., MALPRACTICE: A TRIAL LAWYER'S ADVICE FOR PHYSICIANS (HOW TO AVOID, HOW TO WIN) 100 (1977).

progress has been made toward reduction of class size. Teachers are graduated and cannot find jobs. Schools close because of a lack of students. Rarely, however, do public schools operate with an average class size in elementary grades of under 1 to 25: 1 to 20 is extremely rare, 1 to 27 is more usual. In secondary schools the ratio is seldom 1 to 30, but averages 1 to 35.

Involve postsecondary institutions, colleges of education as well as other colleges such as public administration, business, and law, in the policymaking of education and allow them some responsibility in carrying out educational policies

For example, colleges of education were vital to the development of Florida's teacher competency testing. The results of the testing will affect both the entry into colleges of education and entry into the profession itself. A similar program, were it to be developed for administrators in education, may require similar input from colleges of public administration, business, and law, and others since administration requires knowledge beyond that of education.

Involvement of colleges of education and others at the local school district level could do much to point out strengths and weaknesses and offer suggestions for improvement in education practices and management skills. Much of value may result from an interinstitutional approach to textbook adoption, purchase or production of curriculum materials, and preparing curriculum packages if departments of music, art, and science are utilized to a greater extent.

Increase availability of information concerning legal aspects of education

Educators have few opportunities to acquire information concerning the legal aspects of education. Students often have better access to information on law that affects them than teachers do.[19] Additional college classes at both undergraduate and graduate level are needed to increase educator awareness of rights and responsibilities inherent in local, state, and federal law involving education.

Looseleaf services and school law materials are published in record amounts. Never before has so much material been available concerning legal aspects of education. Much is aimed at the practitioner and is easy-to-understand, practical, current information. Of special interest to school personnel are *Education Daily, Nolpe School Law Update, Nolpe Notes and Reporter*. Information from sources such as *US Law Week* should be disseminated through a mechanism such as a newsletter that

19. Although Florida law makes provision for law education in grades K-12 as well as in-service education for teachers, administrators, and others, little training has been provided for teachers. *See* FLA. STAT. § 233.0615.

would reach school boards, superintendents, central office personnel, administrators, and teachers. Specialized information such as pertains to vocational-technical teachers, teachers of handicapped students, physical educators, guidance counselors, and others could be coordinated through the district supervisor responsible for each area.

Be involved in the legislative process

Each educator should be aware of current and pending legislation which affects him directly and affects those things he does. Lawmakers and their staffs depend heavily on input from lobbyist groups and their constituency to bring areas of concern to their attention. If an educator or any citizen, for that matter, becomes aware that a law is potentially harmful due to an unanticipated impact, that educator has a responsibility to bring that fact to the attention of someone who can influence that piece of legislation. It may simply involve a phone call or a short note to a legislator, or a member of his staff, or the lobbyist for the district or group affected The same may be true for initiating legislation.

Demonstrate a willingness and ability to initiate suit or countersue to discourage suits

A willingness to countersue discourages suit, especially those that are filed maliciously by disgruntled complainants, and for which there is little chance of success in recovery.

The best defense for a school district charged with educational malpractice is to engage regularly in good educational practices. Of course, this has the added benefits of causing fewer suits to be brought in the first place, and having even fewer succeed. Knowing his is a strong defensive position tends to give a defendant the added advantage of knowing that he may be successful as a plaintiff in a countersuit.

Suits will occur and the potential increases with nearly every additional service a school system offers. That should not discourage new programs. No matter how good a professional is or how well intentioned he performs his tasks, malpractice suits may occur that are malicious or not so well intended. When they do, there are alternatives to sitting still and taking it. School districts can learn what other professions eventually learned the hard way, that by demonstrating a willingness to countersue, they discouraged many suits.

BUT, WHAT ABOUT OUR ACTUAL PRACTICES?

As courts have acknowledged, and as every practitioner knows, there is no agreement about what constitutes a "best" way to educate.

There is much documentation to indicate, however, that some ways are better than others, and there is little doubt certain practices are undesirable, and should be discouraged.

The following are suggestions for changes of certain actions that may improve current practices.

Set minimum standards for student competency

School districts should take the initiative in establishing, setting, and measuring standards of minimum student competency. In Florida, the legislature, in Section 229.57, Florida Statutes, in its wisdom mandated that this task be assigned to the commissioner of education. The student assessment section of the division of public schools oversees most aspects of the testing program. An effective working relationship exists between the legislature and the department of education in the development and administration of the testing program within the public schools. There has been a willingness on the part of the legislature to amend the statutes concerning educational accountability making appropriate changes to accommodate changing educational needs.

An effort has been made to keep the channels of communication between the various governmental agencies open in regard to the assessment programs. Universities have been involved from the outset; attorneys are consulted concerning compliance of Florida's program with recent court decisions on testing and placement; and, much is done to adjust the program to the special needs of students such as those who are blind, handicapped, or foreign speaking.

It is vital that an appropriate standard of care in education and placement of students be evident. The school district must formulate policies consistent with reasonable standards of care and develop procedural safeguards to permit careful scrutiny to insure adherence to safeguards that are developed.

The assessment and evaluation of students may or may not involve a formal testing program. Other methods of evaluation may be an informal testing program. Other methods of evaluation may be explored and found preferable. The trend for traditional testing methods seems to be here to stay for awhile as evidenced by all 50 states' consideration of this as a viable method of determining achievement of its students. However, this should not be the only criteria for promotion, placement, or graduation nor should the search for an effective, efficient, equitable method of evaluation stop with minimum comptency testing as it now exists.[20] Coleman and Burkhead found in their studies that

20. T. Flygare, Causes for Increases in Education Law Cases, Speech delivered February 28, 1979 at Phi Delta Kappa, Florida A & M University Chapter, Tallahassee.

achievement is highly correlated with family income, educational background, and aspirations of other students in school.[21] This may be an important consideration in determining how much weight test scores have on placement decisions.

Influence colleges of education to require teachers to learn to diagnose and prescribe in all areas of teaching

Diagnosis of educational problems and prescriptions for "cures" requires special training that educators cannot afford to have to learn on the job. Learning to read is a process that, for many chidlren, is not completed in the elementary school. Every K-12 teacher needs to understand how children learn to read and how to improve those skills in any area where reading occurs—and there are not many areas where this does not occur the greater part of the instructional period. This is not to suggest that every high school physical education teacher needs to be able to teach a complete reading lesson; but it is to suggest that a high school math teacher may need to be aware of the varied reading levels of her students and provide for their differences in reading abilities.

Establish specific objective goals and remediation procedures for each grade

The court in its decision concerning Florida's testing program praised the procedure of establishing specific objective goals and testing to determine mastery of those goals. Remediation in *Debra P. v. Turlington* was recognized as an important part of this diagnostic and prescriptive process. This works best when test scores are used to determine placement in such classes and where movement into and out of the program is fluid; *i.e.*, after a student has been remediated, he may move back into a regular classroom.

Teachers should be required to work not only on these minimum goals but should also establish similar goals for other areas of the curriculum for which they are responsible. This does not mean reducing the curriculum in its lowest common denominator. It does mean establishing a recognizable framework within which each teacher will work.

Use established minimum competencies and basic skills as partial criteria for progression through the grades (promotion) and graduation

This should not be the only criteria but it should be a major consideration when decisions concerning pupil progression and graduation are concerned. Objective test results provide excellent documentation

21. R. Funk, *Don't Bet on the Test Score Bandwagon*, KAN. SCH. BD. ASS'N J. (Spring 1980) at 8.

to indicate strengths, weaknesses, and compensatory measures taken to remediate students. If a student graduates, then claims he has suffered academic harm that has left him functionally illiterate, the school district can present a strong defense if it can show that minimum standards for functional literacy were set and the student reached those standards.

At the same time, a student who has not passed such tests, but has been promoted and/or graduated, has all the evidence he needs to show that the district failed to educate him to a minimal standard, was aware of it (through test scores), but misrepresented his progress (by promoting him). While minimum competency and basic skills tests can produce a classic catch[22] situation for educators, it may be an acceptable risk that must be taken to insure fairness to students and to protect them from a meaningless, inadequate education.

Require teachers to have some evaluation mechanism

These may range from teacher observation to teacher-made tests, reading company tests, and so on. The important thing is to make certain that teachers are setting standards based upon what their experience and training tell them are appropriate. This should be a formal process rather than a hit-or-miss method. If a kindergarten teacher believes her observation of student interaction at snack time reveals important information concerning social maturity, and she wishes to use this in evaluating a child, she can develop some way of recording her observations through use of a checklist or by keeping anecdotal records. She should not take the process casually and then report that information back to parents with no back up. Too much harm has been done to children whose parents "took the teacher's word" for comments a teacher cannot recall saying or cannot remember on what she based her remark.

Establish individualized education plans

Individualizing education, teaching each child at his level at his own pace, tailoring materials and programs to meet student needs is the optimum teaching method of the present and the near future. To ask teachers to prepare individualized education plans (IEPs) to supplement traditional monthly, weekly, and daily planning should be a minimum requirement. However, this tends to be an enormous task, particularly with the large class load most carry. At the same time, many teachers find that individual plans are necessary in order to keep track of what is being taught, to whom, when, and by whom (extra personnel is often required).

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22. M. McClung, *Hoffman Case: Educational Malpractice*, FOOTNOTES (Feb. 1980).

Provisions of PL 94-142 (Education for All Handicapped Children Act) are excellent recommendations for what should be a part of the minimum planning of a student's educational program.

Provide teachers with a mentor

Many bad professional practices are the result of a negligent rather than an intentional action. However, the patient is just as dead and the student is just as ignorant regardless of whether the surgeon or the teacher intended the harm. Just as a surgical team, led by a top surgeon, must provide on-the-job training for the young physician once he leaves his books, so also a team-mentor approach may be valuable to the young teacher.

Resolve "social promotion" policies

With all states at least considering and 38 adopting minimum standards and testing to measure achievement of those standards, social promotion seems in direct opposition. Using standards as criteria for grade progression and for graduation are the next logical steps. Sixteen states have adopted the passing test score as a requirement for promotion and/or graduation. Since there are other factors that come to play in student ability that may be measured by a test, there should be some flexibility once the testing process is deemed successful.

Improve methods of reporting pupil progress

Most parents and students understand grades like *A, B, C,* or *1, 2, 3, 4,* or *70, 75, 80*—are comfortable with the method and reluctant to have report card time roll around without such direct feedback.

However, there are other, perhaps more subjective, accurate and effective methods that can supplement the graded report card. Conferences and written narrative comments are two such alternatives to the usual graded report card.

Be aware of foreseeable risks that accrue when students are inappropriately placed or promoted

A review of recent court decisions in this area of the law will make the legal issues clear. However, a humane attitude toward individual students, their goals and their aims will yield a clearer picture of what they and their parents expect to happen as a result of their schooling. Anything that impedes attainment of the highest achievement level possible for each individual or fails to encourage fullest participation in educational opportunities provided is suspect.

Establish procedural safeguards concerning student placement

Due process procedures similar to those required by PL 94-142 should be provided for all students and their parents, including notification of the placement decision whenever placement is other than that involved in normal pupil progression. An opportunity should be provided for parents and older students to examine appropriate records. Opportunity for an impartial hearing with the student represented by counsel in which parents may participate should be established. The procedure would also require a process of review and appeal as well. A similar, though less formal, structure, might be considered for challenges to normal pupil progression plans, particularly where testing scores are a major factor in determining which students pass and which fail. The actual procedures required by PL 94-142 are cumbersome and time consuming and therefore adaptations of this procedure are preferable to wholesale adoption of PL 94-142 safeguard system.

Require that written approval be obtained from parent or guardian for any act or agreement which may affect his child's rights, privileges, status, placement

This may not be a legal requirement but it is an important procedure to follow, especially in areas that may have the potential for misunderstandings. Educators and parents should function as partners in the child's educational process—and partners often put agreements in writing. A paper signed by a teacher, a principal, a counselor, and a parent concerning temporary placement in a classroom may or may not constitute a legal contract; however, it is an indication that a parent has had an official role in the decision. The school will be more likely to keep in mind the word "temporary" when such is the language in a written agreement.

A form can be prepared that will provide certain basic information concerning the change, when the change is to occur and when the decision will be reconsidered. Signatures of all those involved in the agreement are essential. It may be wise to have the school board attorney review the form, keeping in mind its purpose and potential for creating liability as well as avoiding it.

Require written confirmation of certain advice given a parent

Common sense and basic courtesy require that after a conference involving important decisions, a follow-up of some kind be made. Many educators make this a regular part of their routines; others do it on a sometimes basis; and still others have never considered it. A simple form can be designed that will not only provide quick, easy follow-up to insure that both sides understand what took place, but will also add an air of professionalism to the endeavor.

Keep good, accurate written records

Routine matters such as phone calls, letters, home visits, conferences, report cards, lesson plans, and test scores—to name a few—are ones which need to be recorded as reference for protecting the educational interests of students. They may provide a good defense by providing documentation that a sound educational program is operating.

Issue various kinds of diplomas

By leaving one standard diploma, schools provide all students with identical exit tickets, that may not have equal worth in the marketplace. Acknowledgment that students have varied skills, abilities and interests should be recognized and honored through the awarding.

Various kinds of diplomas could be issued to indicate the varying requirements taken to receive it (academic, vocational, business), the manner in which it was earned (results of a test score, attendance, earned credits), or the place where it was earned (vocational institution, accelerated program at a junior college, life skills program in the community). Care must be taken to insure that stigma is not attached to certain types of diplomas that make them less desirable and hence, at least on the surface, less valuable, or result in what amounts to a "tracking system." Provisions should also include conditions for "early-outs" by advanced students or those whose programs could be completed in fewer than the usual 12 or 13 years.

Develop (or redevelop) appropriate written documents such as handbooks and policies for governing bodies

Practical information needed by administrators, teachers, parents, and students should be readily available to define pertinent policies and establish lines of communication. Report card grading systems, dates of reporting periods, testing schedules, and a general calendar of events are of interest to all groups. A code of behavior and penalties for violations are not only helpful but may be legally required to show evidence that students and parents are aware of school rules and regulations.

Develop office manual to detail step by step procedure for all services regularly handled

The kinds of information on a single student housed in a school office is perhaps the most comprehensive collection of data that will ever be gathered on that individual throughout his lifetime. Yet, the place where all this vital, personal data is gathered and maintained often gives the appearance of being something less than might be desired.

School offices often are small, overcrowded, understaffed places filled with kids' artwork, attendance sheets, new textbooks, old textbooks, lost and found items, and kids in need—of bandaids, chalk, the phone—or waiting to be paddled.

Improve evaluation of teachers

The traditional methods of teacher evaluation with the principal visiting classrooms periodically might not be providing the diagnostic information that it should. Generally evaluations are quick affairs where a principal walks through various classrooms in his school a few times year or where he announces that he will visit for a specified number of minutes—typically 20-30 minutes. Teachers then prepare what amounts to a demonstration lesson that may or may not reveal their strengths and weaknesses. A better diagnostic and prescriptive method should be adopted.

Current methods seem to be unsatisfactory to all concerned providing little data and even less opportunity for teachers to improve their skills based upon constructive criticism. Many principals are actually not the best evaluators of what occurs in most classrooms. They have little experience in any area other than where they themselves taught and have never learned much about how to evaluate and offer meaningful suggestions for improvement.

A team approach whereby teachers evaluate each other under the guidance of principals and curriculum supervisors may be a more effective approach. Peer evaluation will help both those evaluated as well as those doing the evaluating.

Provide remediation for teachers

To deprive a teacher of a job is a serious step that must, nonetheless, be taken where it can be shown that he is ineffective, or negligent, for example. Where there is doubt concerning effectiveness, it may become necessary, and certainly is prudent, for districts to provide certain safeguards, such as a documentation, to substantiate the claim and due process procedure as recourse. An important step that is generally omitted is remediation. Through evaluation procedures, administrators should be able to recognize and identify a teacher's deficiencies and give a list of the complaints at the same time. The district may need to provide the opportunity for remediation to show its willingness to be reasonable in its expectations of its teachers.

Match areas of instruction with a teacher's certification

With the supply of teachers exceeding the demand, there seems little excuse for permitting a teacher to work outside her area of

certification. Colleges of education can provide for broader certification, encourage teachers to go into fields where greater needs exist, or both the districts and the colleges can look at other fields, such as health care services, to recruit personnel who can be cross-trained to meet educational needs of students who are now in classrooms that once would have been in institutions. To defer some of the cost for such programs, cooperative programs between districts and state may be considered.

Use classroom aides, tutors, volunteers, and interns wisely

When a patient retains a doctor for surgery, he expects that doctor to operate. When a student is assigned to a teacher it is expected that the bulk of that student's instruction will be provided by that teacher. It is possible, however, for a particular student to be assigned to work with aides, volunteers, tutors, and/or interns to such an extent that he spends little instructional time with the assigned teacher. This arrangement can create many unnecessary problems for the student and the teacher. Circumstances such as this can be detrimental and inequitable for students and fraught with legal problems. Where it is educationally appropriate to have someone other than the classroom teacher assist in providing instruction, it may be advisable to inform the parent of the arrangement and get written permission or at least acknowledgment. The ultimate responsibility for what happens in the classroom is that of the regular classroom teacher. Delegation of authority or responsibility for a child's learning, like his safety, carries with it the risk that a careless action on the part of a surrogate may accrue to the teacher as a charge of negligence. This is especially risky when the surrogate is not trained to handle the task assigned. Additional assistance from other adults in a classroom can do much to enhance the educational program; however, efforts must be made to insure that where this practice is used, it is not abused. Increased awareness and specific guidelines on the part of the school district are needed to insure that students are benefited by the program.

Employ public relations person with strong educational background at every level possible

Education is most definitely "big business." To borrow some of the more successful techniques from other professions may be good business.

Some states have been successful in this activity at the district level where the public relations person had ready access to community sentiment on a daily basis. Emphasis should be placed on effective use of the

media and improved personal contact within the educational community as well as the community at large.

Providing easy access to the superintendent for teachers can have a similar benefit. Some superintendents make a practice of scheduling meetings on a regular basis at various schools and inviting the staff there or from other schools to schedule brief visits for nearly any purpose they consider appropriate.

Regular newsletter and newspaper articles to promote educators and educational activities should be a regular occurrence rather than an exception. Even lawyers and those in the health professions realize that it pays to advertise. Educators may wish to advertise their superior product through some of these practices.

Observe your own rules

If a rule states that all students who score below 70 percentile on a specific test will be placed in a special program, put them there. If the rule states they will be retested or reevaluated in two years to determine placement, then retest or reevaluate in two years.

Changes in state and federal law, rules and regulations often mean revamping local rules. Not only do the changes need to be made to comply with state or federal laws, but they need also to be communicated to those they affect at other levels. For example, PL 94-142 brought about changes throughout the nation's school systems that affected state, local, and even building level rules and policies. The facts may not have been adequately communicated to those that need the information. The result has been confusion, errors in judgment, unintentional negligence, and ultimately school districts being sued.

Too often school districts invest time and money in developing rules or guidelines and then fail to enforce these rules or even determine that they have been adequately disseminated or understood by those who must operate under them on a regular basis.

Be aware that financing patterns have the potential for creating liability—exhibit conscious spending decisions

Equality in funding formulas can be, perhaps, one of the most discriminatory practices in a democratic educational system. Students enter school unequally, have unequal abilities and needs, and will exit schools unequally. To attempt to provide equal dollars for their education has negative consequences: those who require more, receive less.

Cases involving finance issues have tended to focus on constitutional guarantees such as "thorough and efficient education" and "adequate educational opportunities." There has been little emphasis on financing as an area of tort liability. However, decisions such as greater

funding for gifted than EMR students or requiring passing scores on minimum competency tests for promotion or graduation present areas of concern that could result in suits sounding in tort.

School boards must make every effort to insure that when students receive different funding allocations based upon different achievement levels, it is clearly understood why that is occurring. It is important that it be understood what measure of achievement was used, how it was used, and why it was used.

Employ legal counsel

Ideally legal counsel should be a full-time member of the central office staff. Where this is not financially feasible, an attorney should be employed on a retainer basis. The attorney's function should be as an authority on general law. He should not be expected to be equally conversant with all aspects of law that affect school board operations. Besides the legal aspects of education, school boards need advice and guidance concerning local zoning ordinances, building codes, product safety, tax laws—to mention a few. A legal counsel can function most effectively as an overseer, with the authority to consult with or even engage attorneys as they are needed for advice on specialized problems.

Court cases in education are fraught with examples of legally but, under the circumstances of the particular student, unreasonable behaviors on the part of those who perhaps should have known better. Educators know the implications of an action in the classroom and lawyers know the implications of that same action in a courtroom. Decisions made in education on legal issues should logically be based upon sound educational principles with all legal implications considered.

AREN'T THERE LEGAL RESTRICTIONS THAT INTERFERE WITH GOOD EDUCATIONAL PRACTICES?

Yes. Some such as those handed down by courts are ones that must be lived with. Others, such as state laws, require compliance but can be changed through the legislative process.

Redefine teacher tenure

Teacher tenure is actually a due process procedure intended as a safeguard against arbitrary or capricious dismissal. It has evolved over the years into somewhat of a guarantee of job security—not as a matter of law but as matter of practice. School boards have the authority to dismiss teachers who are incompetent but often fail to exercise their

authority—either because they have not been informed by their administrators, or perhaps do not wish to become involved in the unpleasantness.[23] For whatever reason, neither school boards nor school administrators are willing to take preliminary steps of documenting behavior or making substantial changes in evaluation procedures which would support allegations of incompetence against a teacher.

It has become rare for a teacher to be dismissed except for gross misconduct, blatant insubordination, or criminal actions, even though it has been estimated that some teachers are illiterate, or incompetent, and that many tend to be largely ineffective or inadequate.[24] These are harsh statistics and emphasize a need to utilize the due process procedure inherent in tenure. Protecting incompetency does little to upgrade or improve a profession. To the contrary, it erodes professional attitude and encourages many to retire on the job.

Return governmental immunity to state employees in specified areas such as academic negligence

The ultimate remedy to stop suit is to reinstate sovereign immunity. Under this doctrine, based on "the King can do no wrong" theory, governments and their agents could not be sued. However, a Florida Supreme Court decision in *Lake County v. Talmadge* had the effect of making government employees (such as teachers) personally liable for their own acts of negligence. Prior to this decision, state law provided "waiver" of sovereign immunity for government and its employees and made the employer liable to negligent acts of his employees.

ARE THERE ANY OTHER CONSIDERATIONS THAT WILL EASE THE PAIN OF GOING TO COURT WHEN EDUCATIONAL MALPRACTICE OCCURS?

Yes. There is provision within some state laws concerning professional practices of educators, physicians, and others that have potential alternative mechanisms in place, easily adaptable to the education situation. Attention must also be given to the question of insurance of what educators see as the role of the insurance company in malpractice.

Support malpractice insurance written by a national company operating under federal guidelines and offered on flat rate basis

It is uncertain whether or not traditional liability insurance policies (such as that issued by Horace Mann Insurance Company) will cover

23. Testimony before the Florida Senate Committee on Education concerning Professional Practices Services proposals attested to this situation.

24. P. COPPERMAN, THE LITERACY HOAX: THE DECLINE OF READING, WRITING AND LEARNING IN THE PUBLIC SCHOOLS AND WHAT WE CAN DO ABOUT IT (1978).

educational malpractice as it does other negligent acts. Patricia Hollander worte in 1979 that at the time her research indicated that not one insurance company wrote a policy covering educational malpractice.

The medical experience with malpractice insurance creates problems for the profession that can and should be avoided by educators. In 1974, thirty companies wrote malpractice insurance; by 1977 there were double that number. This meant that the insured'a were "fractionalized" between more than 60 companies. Rates soared. Instead of getting rid of companies unable to provide adequate coverage at reasonable cost, state governments passed panic legislation.

A national company operating under federal guidelines could design a malpractice insurance system for all professional groups to work in the best interests of professionals and the public. A flat rate premium, as malpractice insurance had been in the 1950's, would be less discriminatory, would spread the cost over a larger group (rather than having a high risk group pay much higher premiums). It would contain "deterrent provisions" and provide much needed statistical data on the malpractice problem.

Currently, it is difficult to get accurate malpractice information concerning any one profession and virtually impossible to compile such data on all incidences of malpractice. Because incident reports would be available universally, that data would give a clearer picture of the malpractice problem. From this, a basis for establishing a sophisticated risk-management system could be developed to improve practices that fall below standards for that profession.

Develop mechanism for handling educational malpractice charges before they end up in court

A procedure such as is provided by PL 94-142 may be instituted at the district level to handle problems before they reach the suit stage. A structure for recourse concerning proposed placement and treatment of a student, for example, should be the first step. The parent would then have an opportunity for independent evaluation of the student, and finally, access to impartial due process hearings.

Institute nonbinding arbitration for resolution of malpractice disputes

Arbitration has become a popular method of settling disputes at the pre-trial stage. Medical malpractice panels, endorsed by both the American Medical Association and American Hospital Association,

typically consist of a panel of three lawyers who listen to a dispute, weigh the relative merits, and then render a ruling that may include a settlement to be paid to the plaintiff. If both sides agree to the ruling, the case is settled; but if either side disagrees, the case goes on the court docket.

The experience with medical panels has been that even though the decisions are nonbinding, their recommendations are frequently accepted or become the basis for a later pre-trial settlement. One of the advantages of nonbinding arbitration panels is that their quick resolution of cases (6 months to a year as compared to several years) saves money and avoids further harm to the plaintiff.

The advice offered for educators is that panels be mandatory, not optional, and comprised of attorneys, not educators. Educators are more effective serving as expert witnesses rather than as members of the panel.

SUMMARY

Increased demands to hold both government, professionals, and others accountable, has been expressed by the American public in a growing tendency to seek redress through the courts. This trend coupled with the analogous experience in the medical profession has produced a phenomenon in both education and the law—the educational malpractice suit. Parents, dissatisfied with the results of schooling, have begun to sue schools alleging students have failed to learn because schools have been negligent in their professional duty to educate. The response to this problem has come mainly, thus far, from legislators establishing minimum educational standards. The judicial response has been to recognize the harm but to leave the solution to educators. The guidelines developed by this study represent an educational answer to the problem: identify good professional practices, improve present practices, and eliminate practices which have the potential for liability for educational malpractice.

Ideally, if these guidelines are successful, neither educational malpractice nor suits making that allegation will exist. Even if such suits are brought, the guidelines provide for mechanisms to either dismiss the charges or provide remedy without the need for adjudication within the court system. For the guidelines herewith to function as an effective paradigm, they will require successful implementation in the districts with additional changes to reflect that they are reflections of current law. It will be necessary to evaluate and reevaluate them as practices change and as new responsibilities are assumed.

If the guidelines are unsuccessful, that is, if bad practices continue, students are harmed, and/or suits increase, the guidelines will require additional evaluation and alteration. It will require recognition of why they are unsuccessful and what changes can increase their effectiveness.

An additional cases accumulate concerning malpractice, immunity, testing, placement and other issues related to educational malpractice, it will be essential that the guidelines reflect those decisions. This is also true of changes in state and federal laws and regulations. It may well be that courts will come closer to a legal definition of educational malpractice than has been possible previously. This in itself may call for a revision in the focus of such preventive guidelines as are presented here.

As individual states become involved in either the educational malpractice experience or in evaluating educational output in the form of student competency, evidence is that they soon begin evaluating input in the form of teacher competency. Part of their evaluation of professional practices may involve development of guidelines such as those adopted by Florida school districts as a vehicle for improving professional practices or educators. The laws of each state are unique to that state. Therefore, while the Florida guidelines can serve as a model for other states, to be practical and effective, research must be done similar to what was done here to insure that they are consistent with laws and practices of that state.

Continuous research into the causes of and solutions to the malpractice problem in education carries with it the responsibility to go beyond what other professionals have contributed: gather data concerning professional educational practices that contain the potential for liability in a central (state) place in order to provide a clear picture of the problem; and continually evaluate preventative guidelines, their implication and effectiveness. Educators can start now to investigate their own professional practices in a sincere effort to prevent malpractice and provide a more effective education to students. They can become involved in the legislative process striving to prevent legislation that may create liability for districts but encourage laws which provide educational answers to educational problems.

> Society as a whole accepts the professional's pledge of self-regulation through peer control, and grants in return privileges and advantages ... when charged with negligence, as professionals they enjoy a unique position in the law in that conduct ... is judged by professional ... standards.[25]

25. W. ALTON, *supra* note 18, at 100.

This quotation was found in attorney's advice concerning self-regulation of physicians, but with some effort on the part of educators, dedicated to the professional practice of education, it could easily refer to them as well. Educators can begin by placing emphasis on improving educational practices through identification of poor practices and taking steps to eliminate or change those practices. In this way, educators will be heeding the advice of the courts to initiate action rather than wait for judicial intervention.

Every educator assumes a responsibility to students the moment he walks in a classroom or leans over to help a student: to educate non-negligently, taking care to do his part to assure every student an adequate educational opportunity and to protect him from academic negligence—especially his own.